

ADVISORY OPINION 95-013

Any advisory opinion rendered by the registry under subsection (1) or (2) of this section may be relied upon only by the person or committee involved in the specific transaction or activity with respect to which the advisory opinion is required. KRS 121. 135(4).

August 18, 1995

William T. Robinson, III
Greenebaum, Doll & McDonald
50 East Rivercenter Boulevard
Suite 1800
P.O. Box 2673
Covington, Kentucky 41012-2673

Dear Mr. Robinson:

This is in response to your July 19, 1995, letter in which you request an advisory opinion regarding whether aggregate contributions in excess of \$5,000 by a medical provider group which you represent would preclude the group and its physicians from receiving reimbursement for services provided to Medicaid patients.

KRS 121.330(2) provides that "No entity whose officers or employees, or the spouses of officers or employees, have knowingly contributed in excess of five thousand dollars (\$5,000) in the aggregate in one (1) election to the election campaign of any elected official shall knowingly receive any nonbid contract during the term of office following the election campaign in which the contributions were made." (Emphasis added).

Your opinion request requires that we define "nonbid contract" to determine whether KRS 121.330 is applicable to your clients. The "Kentucky Model Procurement Code," applicable to all expenditures of public funds under contracts or business agreements (KRS 45A.020) does not define "nonbid contract." From its context, KRS 121.330 appears to prohibit entities who exceed the contribution aggregate of \$5,000 from receiving any advantage from state contracts if not subjected to competitive bidding procedures which are governed by KRS Chapter 45A. "Competitive bidding requires that all bidders be placed on a plane of equality, and that they bid upon the same terms and conditions." Black's Law Dictionary.

KRS 45A.075 provides that all state contracts are to be awarded by one of four methods, which include:

1. Competitive sealed bidding (KRS 45A.080);
2. Competitive negotiation (KRS 45A.085 and 45A.090);
3. Non competitive negotiation (KRS 45A.095); or
4. Small purchase procedures (KRS 45A.100).

KRS 45A.095(1)(b) and (g) provide that competitive bids may not be required where rates are fixed by law or consist of personal service contracts. Professional services, such as the ones offered by your client, would be subject to review by the Legislative Research Commission pursuant to KRS 45A.695. However, medicaid provider agreements are excluded from the definition of "personal service contract" which means:

An agreement whereby an individual, firm, partnership or corporation is to perform certain duties, professional or otherwise, for a specified period of time for a price agreed upon which is exempt from competitive bidding pursuant to KRS 45A.095. This definition does not apply to: 2) Agreements with public utilities, foster care parents, medicaid providers, individuals performing homemaker services, and transit authorities. (Emphasis added)

Based upon the foregoing statutes and an analysis of the provisions of the medicaid provider agreement, we find that the agreement is not within the purview of or subject to the Model Procurement Code contained in KRS Chapter 45A.

The medicaid provider agreement is entered into by the Cabinet for Human Resources in the administration of the Kentucky Medical Assistance Program (Title XIX) as required by federal and state regulations. This agreement is utilized for enrollment of medical provider participants and guarantees reimbursement subject to the availability of federal and state funds. The medicaid provider agreement is offered to anyone who possesses the qualifications to participate and agrees to abide by applicable statutes and regulations. It is essentially a third party agreement designed to provide a benefit to the public or participants who are eligible to receive those benefits and not to provide contractual services to the Commonwealth as contemplated by the Model Procurement Code. Under the provider agreement, the participating medical provider receives no exclusive rights to provide services, but only the right to be reimbursed at a rate set for the procedures performed which is determined by federal and state regulations. Because of its lack of exclusivity, both from the standpoint of participation and the guarantee of patient participation, the medicaid provider agreement is not a "nonbid contract" within the meaning of KRS 121.330(2).

Sincerely,

Rosemary F. Center
General Counsel

RFC/db